

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAWAI`I WILDLIFE FUND, a)	CIVIL NO. 12-00198 SOM/KJM
Hawaii non-profit)	
corporation;)	
SIERRA CLUB-MAUI GROUP, a)	ORDER REGARDING COUNTER
non-profit corporation;)	MOTIONS FOR SUMMARY JUDGMENT
SURFRIDER FOUNDATION, a non-)	
profit corporation; and)	
WEST MAUI PRESERVATION)	
ASSOCIATION, a Hawaii non-)	
profit corporation,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
COUNTY OF MAUI,)	
)	
Defendant.)	
)	

ORDER REGARDING COUNTER MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Hawaii Wildlife Fund, Sierra Club, Surfrider Foundation, and West Maui Preservation Association move for summary judgment, arguing that the undisputed evidence demonstrates that the County has violated the Clean Water Act by discharging effluent, without a National Pollutant Discharge Elimination System ("NPDES") permit, at four injection wells at the Lahaina Wastewater Reclamation Facility ("LWRF"). Defendant County of Maui also moves for summary judgment, arguing that Plaintiffs lack admissible evidence of such a violation.

In adjudicating these motions, this court is guided by the Supreme Court's holding that the Clean Water Act requires an NPDES "permit when there is a direct discharge from a point

source into navigable waters or when there is the functional equivalent of a direct discharge." *Hawaii Wildlife Fund, et al. v. County of Maui*, 140 S. Ct. 1462, 1476 (2020). The Supreme Court provided examples of when there would be and when there would not be a "functional equivalent of a direct discharge," explaining that time and distance are important:

Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies. If the pipe ends 50 miles from navigable waters and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.

140 S. Ct. at 1476.

To provide guidance with respect to factual situations that fall between the two examples, the court stated:

factors that may prove relevant (depending upon the circumstances of a particular case): (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity. Time and distance will be the most important factors in most cases, but not necessarily every case.

Id., 140 S. Ct. at 1476-77.

There appears to be no dispute that LWRF is a "point source" or that the Pacific Ocean is a "navigable water." See *id.* at 1478, Kavanaugh, J., concurring ("No one disputes that pollutants originated at Maui's wastewater facility (a point source), and no one disputes that the pollutants ended up in the Pacific Ocean (a navigable water)."). The present motions therefore turn on whether the LWRF's discharge of treated wastewater into its injection wells that then makes its way to the Pacific Ocean is the "functional equivalent of a direct discharge" from the LWRF into the Pacific Ocean. *Id.*

To aid the court in deciding these motions, the parties shall file answers to the following questions, using 25 words or less for each answer, no later than June 9, 2021. If a party does not know or cannot provide the exact answer to a question, the party shall provide the most accurate answer it can in light of the record currently before the court. Answers should directly respond to the questions, rather than viewing the questions as inviting discussion of related matters. This court will hold the parties to their answers.

In answering each question, the parties shall provide the title or name of material relied on, along with the ECF No. and the PageID # of evidence currently in the record that supports each answer. Parties are invited to provide record citations to every piece of evidence in the record supporting any

fact. Parties shall not cite anything not currently in the record. Parties shall then attach a copy of the cited evidence with the record citation (existing ECF No. and PageID #) visible and legible under a corresponding tab (that is, not obscured at the top of the page). The record evidence shall be tabbed with the tab label corresponding to the question number. Only the relevant page(s) cited (preferably limited to two pages per citation) should be attached.

A Word version of the attached questions will be emailed to the parties so that they may use such space as is necessary to provide record citations.

Question	Answer in 25 words or less	Title of material	ECF No. and PageID #
1. Transit time: 1a. What is the minimum documented time (in days) for treated wastewater to move from LWRF Wells 3 and 4 to the Pacific Ocean?			
1b. How long does it take before more than half of the treated wastewater injected into LWRF Wells 3 and 4 on a particular day reaches the Pacific Ocean?			
1c. What is the minimum time that it takes for treated wastewater to move from LWRF Wells 1 and 2 to the Pacific Ocean?			
1d. How long does it take before more than half of the treated wastewater injected into LWRF Wells 1 and 2 on a particular day reaches the Pacific Ocean?			

1e. Jean E. Moran, Ph.D., opines that the time required for effluent from Wells 1 and 2 to reach the nearshore ocean is similar to that from Wells 3 and 4. See Decl. of Jean E. Moran, Ph.D., ECF No. 432-22, PageID # 10561. Is there anything in the record indicating that this opinion is correct or incorrect?			
2. Distance traveled: 2a. What is the minimum distance that treated wastewater flows from LWRF Wells 1, 2, 3, and 4 to the Pacific Ocean?			
2b. What percentage of treated wastewater from the LWRF flows the minimum distance to reach the Pacific Ocean?			
2c. What is the approximate distance traveled by at least half of the wastewater flowing from LWRF Wells 1, 2, 3, and 4 to the Pacific Ocean?			

2d. What percentage of treated wastewater from the LWRF emerges from submarine springs at the North and South Group Seeps?			
2e. Is there any dispute that more than half of the effluent from Wells 3 and 4 emerges at the seeps (even if there is a dispute about how much more than half)?			
2f. What percentage of treated wastewater from the LWRF emerges as diffuse flow in the North and South Group Seep areas?			
2g. What percentage of treated wastewater from the LWRF emerges within 1/2 mile of the North and South Group Seep areas?			
2h. What percentage of treated wastewater from the LWRF emerges within 3/4 mile (straight line) of the LWRF? The percentage should include any percentage listed in the response to 2g.			

2i. What percentage of treated wastewater from the LWRF emerges within within 1 mile (straight line) of the LWRF?			
2j. What percentage of treated wastewater from the LWRF emerges within within 1.5 miles (straight line) of the LWRF?			
2k. What percentage of treated wastewater from the LWRF emerges within within 2 miles (straight line) of the LWRF?			
3. Nature of the material through which the treated wastewater travels: What is the nature of the material through which the treated wastewater travels from the LWRF to the Pacific Ocean?			

<p>4. Dilution or chemical change of pollutant:</p> <p>4a. To what extent has the treated wastewater been diluted as it travels from the LWRF to the Pacific Ocean?</p>			
<p>4b. Leaving aside any chemical change occurring at the injection wells themselves (e.g., by treatment at the wells), to what extent has the treated wastewater been chemically changed as it travels from the LWRF to the Pacific Ocean? What is the nature of the change?</p>			
<p>5. Amount of pollutant entering the Pacific Ocean:</p> <p>5a. What is the amount of treated wastewater entering the Pacific Ocean relative to the amount of treated wastewater leaving the LWRF?</p>			

5b. What is the minimum number of gallons of treated wastewater from the LWRF that emerges every day in the nearshore water in and around the North and South Seep groups?			
6. Manner by or areas in which pollutant enters the Pacific Ocean: Describe the manner by or areas in which the treated wastewater from LWRF enters the Pacific Ocean.			
7. Degree pollutant maintains its specific identity: Describe the degree to which the treated wastewater from the LWRF emerging in the Pacific Ocean has maintained its specific identity.			

8. Is there any dispute that there are elevated water temperatures near the North and South Seep locations compared to the nearshore water further north and south of the seeps? If there is no dispute, is there anything in the record indicating that the elevated temperature could have been caused by something other than the treated wastewater finding its way into the Pacific Ocean?			
9. Is there any dispute that dye running through a hypothetical pipe from the LWRF to the Pacific Ocean would take about 90 minutes to go from LWRF to the ocean?			
10. Could surface runoff and reclaimed water used at nearby properties account for some of the chemicals detected in the seeps?			

11. Each party may add no more than two other issues that only that party discusses, but the party's position must be stated in 25 words or less per issue.			
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IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 26, 2021.



/s/ Susan Oki Mollway
Susan Oki Mollway
United States District Judge

Hawaii Wildlife Fund, et al. v. County of Maui; Civil No. 12-00198 SOM/KJM; ORDER
REGARDING COUNTER MOTIONS FOR SUMMARY JUDGMENT